No. 02-811

Supreme Court U.S.
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In The

Supreme Court of the United States

JEFF GROH, Special Agent with the Bureau of Alcohol, Tobacco, and Firearms,

Petitioner,

v.

JOSEPH R. RAMIREZ, JULIA L. RAMIREZ, JOSHUA RAMIREZ, and REGINA RAMIREZ,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Ninth Circuit properly ruled that a law enforcement officer violated clearly established law, and thus was personally liable in damages and not entitled to qualified immunity, when the law enforcement officer leads a search of a home pursuant to a warrant that does not describe the place to be searched or the items to be seized and all supporting documents are sealed by the issuing magistrate and unavailable for inspection by the home owner?

Whether law enforcement officers violate the particularity requirement of the Fourth Amendment when they execute a search warrant that erroneously describes the place to be searched as an entire ranch and the items to be seized as a house, and the application and affidavit are not attached to the warrant and are sealed by the Court?

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CONSTITUTIONAL PROVISIONS

U.S. Const. amend IV 2, 3, 4, 5

INTRODUCTION

Petitioner has requested a writ of *certiorai* to review the judgment entered in this proceeding by the United States Court of Appeals for the Ninth Circuit.

Petitioner grossly mischaracterizes the facts of this case in an effort to mislead this Court and create an issue where there is none. There was no application or affidavit attached to the warrant in this case. The only documentation that was presented to Mrs. Ramirez at the time that the agents from the United States Bureau of Alcohol, Tobacco, and Firearms and Butte-Silverbow Sheriff's Department raided the Ramirez home and ranch property was the search warrant. The warrant was facially invalid in that it stated there was concealed on the ranch a two story blue house. No reasonable officer could have believed this to be a valid warrant. Based upon that warrant, Petitioner and his entourage spent several hours conducting a general search of Respondents' home, ranch buildings, and vehicles.

Petitioner attempts to create an issue where none exists by attempting to make this case out to be one in which the affidavit was attached to the warrant that failed to describe with particularity the items to be seized. This is simply not the case. The application and affidavit that Petitioner relies on in this case were placed under seal by the Court and unavailable to Respondents or their attorney. Respondents were denied their constitutional right to be free from unreasonable searches and seizures. The search was unreasonable because it was based upon a warrant that failed to describe with particularity the place to be searched and the items to be seized. Respondents could not even challenge probable cause because the

application and affidavit were placed under seal. Even when the Court finally unsealed the documents, the Court ordered that Respondents could not contact any of the witnesses to ascertain if Petitioner had lied in the application.

The Ninth Circuit correctly found that Petitioner, as the leader of the search team has a duty to make sure he has a valid warrant before invading the sanctity of a private home. The warrant in this case was facially invalid because it completely failed to describe with particularity the items to be seized. There is nothing new or novel about requiring that a law enforcement officer make sure that the warrant meets the particularity requirement. The fact that a warrant is issued by a magistrate does not excuse independent inquiry into its validity by the officers executing it. A warrant, like the one in this case, "may be so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon,* 468 U.S. 897, 923 (1984) Petitioner cannot claim that he is being held accountable for failing to "predict the future course of constitutional law." *Procunier v. Navarette,* 434 U.S. 555 (1978) The particularity requirement has been in existence since the adoption of the Fourth Amendment. This Court determined in 1984 in *Leon* that if a warrant fails to particularize the place to be searched or the items to be seized, the executing officer cannot reasonably presume it to be valid. Petitioner is precluded from establishing qualified immunity by *Leon*, the case that first established the "Good Faith Exception" because this Court in *Leon* specifically recognized that it is not reasonable for an officer executing a warrant to rely upon it if it fails to

describe the items to be seized. Petitioner is simply being held accountable for violating a specific textual mandate of the Fourth Amendment, something that every law enforcement officer has had to honor since 1791. His qualified immunity defense must fail because this Court clearly articulated in 1984 in *Leon* that an officer cannot reasonably presume a warrant is valid if it fails to particularize the place to be searched or the items to be seized.

Petitioner's reliance on the "cure by affidavit" cases is misplaced because there was no attached affidavit served with the warrant. The application and affidavit were under court seal. This is not a case where an affidavit containing particularized descriptions of the place to be searched and the items to be seized was served along with a warrant that, in the absence of an affidavit and/or application, would be defective. The facially defective warrant was not even shown to Mrs. Ramirez until the search was concluded several hours after the rummaging of her home began.

Petitioner violated clearly established law. As stated above, the particularity requirement is spelled out in the text of the Fourth Amendment. No officer since this Court's 1984 decision in *Leon* can claim "good faith" or "reasonable reliance" when executing a warrant that does not meet the particularity requirement. Petitioner plainly acted incompetently in conducting this search. He carelessly typed the warrant and got Magistrate Holter to issue it. Petitioner carefully protected his alleged witnesses by getting the file sealed.

REASONS FOR DENYING THE WRIT

Petitioner is attempting to create issues where none exist. The decision of the Ninth Circuit was based on binding authority from this Court and ten years of Ninth Circuit precedent. Petitioner violated clearly established law by invading the sanctity of Respondents' home pursuant to a facially invalid warrant that did not describe with particularity the items to be seized. This Court established in *Leon* in 1984 that no officer could reasonably rely upon such a warrant.

Similarly, Petitioner attempts to confuse the issue by attempting to place this case in the same category as those in which deficiencies of a warrant were cured by attachments to that warrant. Nothing was attached to the warrant in this case.

I. THE NINTH CIRCUIT CORRECTLY HELD THAT PETITIONER VIOLATED CLEARLY ESTABLISHED LAW AND COULD NOT HAVE REASONABLY RELIED ON THE WARRANT

Petitioner conducted a general search of Respondents' ranch and home. The plain language of the Fourth Amendment provides several means of attacking the validity of a search warrant. The Fourth Amendment states: " . . . and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Thus there are four requirements for a warrant to be valid. Any one missing element will render it invalid. The warrant in this case was invalid because it did not describe either the place to be searched nor the items to be seized. The Court need look no further

than the text of the Fourth Amendment to decide this case. The warrant served after the search of the Ramirez home and ranch was one, two-sided sheet of paper. No description of the items sought by Petitioner during the several hour general search was written within the four corners of that document.

Petitioner's claim of qualified immunity must fail because such a claim is inconsistent with this Court's decision in *U.S. v. Leon*, 468 U.S. 897 (1984). The warrant in this case is exactly like that described in *Leon*. It was " . . . so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid." *U.S. v. Leon*, 468 U.S. 897, 923 (1984).

Petitioner, like any other law enforcement officer, should have known about this Court's decision in *Leon* by March 4, 1997. Additionally, any law enforcement officer in the Ninth Circuit should have known there was no exception to the particularity requirement via an affidavit unless that affidavit was attached to and referenced by the warrant. *United States v. McGrew*, 122 F.3d 847 (9th Cir. 1997) is controlling in that circuit. Although *McGrew* was decided six months after the raid in this case, the Court recognized the long-standing rule in the Ninth Circuit, stating:

> The well settled law of this circuit states that a "search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein." *Hillyard*, 677 F.2d at 1340; see also *United States v. Van*

> *Damme*, 48 F.3d 461, 466 (9th Cir. 1995) (invalidating warrant on these grounds); *United States v. Towne*, 997 F.2d 537, 544-47 (9th Cir. 1993) (reaffirming rule and discussing other cases doing same); *Spilatro*, 800 F.2d at 967 (holding that affidavit could not cure overbroad search warrant because it was not attached to it).

McGrew, at 849. The violation of the innocent Respondents' constitutional right to be free from unreasonable search and seizure is apparent. The warrant was invalid. It did not describe the place to be searched or the items to be seized with particularity or at all. No affidavit was attached to and/or referenced in the warrant. Construing the warrant in the light most favorable to the Petitioner would only allow him and his cohorts to search the ranch for a two story blue house that is visible from Interstate 15.

The Ninth Circuit recognized that there are circumstances in which a warrant that fails the particularity requirement may be validated by the affidavit in support of the warrant. If the affidavit is served with the warrant and the warrant refers to the affidavit, the affidavit may be incorporated by reference. Otherwise it is invalid and the executing officers cannot claim "good faith."

> Although dicta in Towne, supra, suggested that the good faith exception might be available when the agent who drafted the affidavit is present at the search or when the agents confine their search to the scope of the affidavit, Kow subsequently squarely held that such facts, even if true, cannot establish good faith. See Kow, 58 F.3d at 428-30. The agents must either serve the affidavit with the warrant or list with particularity its relevant directives on the warrant itself.

> Otherwise, the good faith exception is not available because (1) the requirement of attaching affidavits to general warrants has been the clear law of this circuit for over a decade, foreclosing any "reasonable belief" to the contrary; and (2) no matter how aware the officers are of the limits of their search, the person being searched (the second aim of the rule) is still completely unaided when agents fail to produce a document explaining the parameters of the search.

McGrew, at 850. Petitioner violated clearly established law of the Ninth Circuit and is not entitled to qualified immunity.

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE IS CONSISTENT WITH THIS COURT'S DECISION IN *LEON* AND DISTINGUISHABLE FROM CASES FROM OTHER CIRCUITS

As stated above, this Court recognized in *Leon* that a warrant could be so facially defective that the executing officers could not reasonably believe it to be valid. In this case anyone who would have read the warrant should have known it was invalid. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) did not specifically address the "cure by affidavit" rule that has been adopted by the lower courts although a more detailed affidavit accompanied the defective warrant. However, this Court did observe that "if the judge had crossed out the reference to controlled substances, and written 'see attached affidavit' on the form, and attached the affidavit to the warrant, the warrant would have been valid." *Id.* at 990 n. 7. This statement by this Court is the precursor to the "cure by affidavit" rule adopted by the Ninth Circuit and others. The cases cited in *McGrew* established well before 1997

the rule that in order for an affidavit to be used to support an otherwise overbroad warrant, the affidavit must be referenced in and attached or accompany the warrant while the search is being executed.

Petitioner attempts to create an issue where none exists. This is not a case where an affidavit was attached to a facially invalid warrant. Thus any case that Petitioner cites for the proposition that an attached affidavit cures a defective warrant provides no support to his case. In fact none of the cases cited by Petitioner are on point.

The Fifth Circuit cases are factually different from this case. The Fifth Circuit in *United States v. Cherna*, 184 F.3d 403, 412 (5th Cir. 1999), *cert. denied*, 529 U.S. 1065 (2000) recognized that it was not a case where non-attachment of the affidavit made the warrant so obviously defective that the officers could not reasonably have relied on it. The Court stated, "First, Attachment B, expressly mentioned in the warrant and attached thereto, referred to Smitherman's affidavit and described in considerable detail twenty-six categories of evidence to be seized." *Id.* In *United States v. Beaumont*, 972 F.2d 553 (5th Cir. 1992) the affidavit of the applicant accompanied the facially defective warrant. In *Beaumont*, the detailed affidavit was attached and in *Cherna* there was a detailed attachment that also referenced the detailed affidavit. Both are significantly more particular than a warrant that claims that there is a two story blue house concealed on a ranch! Even the warrant in *United States v. Shugart*, 117 F.3d 838 (5th Cir. 1997) came closer than the warrant here. The agents in *Shugart* seized evidence related to methcathinone production based on a warrant that "contained boilerplate

provisions obviously intended for use in cases involving possession with intent to distribute narcotics." *Id.* at 844.

The Eighth Circuit cases are no help to Petitioner's case. In *United States v. Curry*, 911 F.2d 72 (8th Cir. 1990) the Court stated that the "well-established rule" in that circuit was "that the affidavit must both accompany the warrant and be incorporated into it." *Id.* at 77 n. 4. The Court noted that these requirements were not met, However, "the application and affidavit were in actuality a single three-page document, entitled 'Application for Search Warrant and Supporting Affidavit.' . . . this document was attached to the warrant, which was labeled as page four. The issuing magistrate signed both the warrant and the application/affidavit form." Petitioner's Application and Affidavit in this case were not attached, and in fact were allegedly under seal, at the court. Despite the "seal" the Petitioner was able to produce the face page subsequent to the search. The Petitioner was also allowed to supplement his application with an additional affidavit. *United States v. Thomas*, 263 F.3d 805 (8th Cir. 2001) was similar to *Curry*, a case where no address was on the warrant. The warrant in *Thomas* contained the wrong address for the house to be searched. In *Thomas*, the correct house was under surveillance at the time the officer went to get the warrant.

The warrant in *United States v. Simpson*, 152 F.3d 1241 (10th Cir. 1998) mistakenly described the items to be seized as concealed upon the person, but subsequently described the premises to be searched. Thus the warrant itself provided the officer and the homeowner a description of the place to be searched and the items to be seized. The Court adopted a standard of "practical accuracy rather than technical precision." The Tenth Circuit used this

standard again in *United States v. Ortega-Jimenez*, 232 F.3d 1325 (10th Cir. 2000). In that case the Court interpreted the term "present and arriving" in the warrant to include persons that had left the scene prior to the receipt of the warrant. Here again the storage unit was under surveillance at the time an officer went to get a search warrant. The defendant had already left the storage unit prior to the officers obtaining the warrant, but arrived and left while the officers were watching the unit waiting for a fellow officer to return with a warrant. The Court relied upon the unattached affidavit to clarify with "practical accuracy" the meaning of the term "present and arriving" to include the defendants that came to the unit while it was under surveillance and an officer was applying for the warrant. These cases are factually dissimilar to the present case that authorized a search for a two story blue house.

Finally, the Third Circuit supported the position of the Ninth in *Bartholomew v. Pennsylvania*, 221 F.3d 425 (3d Cir. 2000). Qualified immunity was granted because it was not the clear law of that Circuit at the time that a lack of particularity in a search warrant cannot be cured by reference to underlying affidavits that have been placed under seal. This is not the case in the Ninth Circuit. The Ninth Circuit specifically acknowledged in *McGrew* that good faith would not apply in these circumstances because the "cure by affidavit" rule in that circuit that required incorporation and accompaniment was well established "for more than a decade".

CONCLUSION

The petition is without merit. It wrongfully claims the affidavit was attached to the warrant when it was served. The Petitioner's search of the Rameriz house was unlawful. Such a search has been unlawful since *Leon* in 1984. The Ninth Circuit clearly followed the precedent established in the Circuit for more than a decade, that a defective warrant cannot be cured by an affidavit not served with the warrant. There is no good faith immunity defense available to the Petitioner. The petition should be denied.

Respectfully submitted,

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